CHE JAH BINTE MOHAMED ARIFF v. C. C. SCOTT.

[Orig. Civ. Juris. (Jobling J.) February 26, 1952]

[Penang — Civil Suit No. 215 of 1949]

Damages — Claim for — Latent defect in the brakes — Inevitable accident — Negligence.

The plaintiff was a passenger in the defendant's car which the defendant drove. The brakes failed to act as the car went down a hill and crashed into a stationary car and the plaintiff suffered injuries. The defendant gave evidence that 10 days previously the brakes had failed and he had sent his car to a competent motor repair firm for repair and general overhaul with particular attention to the brakes. On the day before the accident the plaintiff and the defendant had gone to fetch the car and found the foreman of the repair firm about to take it out for a test; the brakes were tested and found in order. On the day of the accident the plaintiff with other people were in the car and taken over several miles of road during which the defendant used his brakes several times and they acted properly. The defence set up was that the accident was inevitable and that no negligence could be attributed to the defendant. The Court found it proved that the defendant on finding that his brakes refused to act immediately called out to that effect.

Held, that the defect in the brakes were a latent defect and as the defendant had employed skilled labour no negligence can be attributed to him.

Cases referred to :—

(1) *The Kite* (1933) P. 154.

(2) *The Mulbera* (1937) P. 82.

(3) *Stennett v. Hancock* (1939) 2 All. E.R. 578.

(4) *Woods & Duncan & Ors. v. Cammell Laird & Co. Ltd.* (1946) A.C. 401.

ACTION FOR DAMAGES.

Lim Huck Aik for the plaintiff.

Ong Huck Lim for the defendant.

Cur. Adv. Vult.

Jobling, J. : — The plaintiff claims damages for injuries suffered while being driven by defendant in his car.

The evidence shows that the defendant wished to buy some land from plaintiff and took her and her husband, their grandson and a friend named D. L. Wong to inspect the land on 26th August, 1949. Defendant's wife and another lady also came with the party and there were altogether 7 persons in the car. They spent the day there having food and a swim and on their return journey defendant turned off the main road and drove up the hill to Mount Pleasure Restaurant. They had lemonade drinks there and started to go down the hill about 6 p.m. The defendant was driving and at the bottom of the hill when turning into the main road the defendant's car struck a coconut tree and then crashed into a stationary car standing on the main road and plaintiff was injured and became unconscious. She was in hospital for 16 days suffering from a long cut over the top of the head and a fracture of the bone there.

These facts are not denied and the plaintiff's case has been presented as a case of *res ipsa loquitur.*

There is no doubt that on these facts, if unexplained, it would be reasonable to hold that there must have been some negligence on the part of the defendant.

But the defendant gave evidence that the cause of the accident was the failure of the brakes on his car. He states that when going down the hill from Mount Pleasure he drove in first gear which acted as sufficient check on the speed of the car and he had no need to use his brakes at first. But when near the bottom of the hill the engine stalled and the car began to accelerate. He then applied his brakes and they failed to operate. At the bottom of the hill he had to turn right into the main road or go over the embankment. He tried to turn into the main road but there was a car on the other side of it opposite the exit from the Mount Pleasure Road and he could not avoid it because he could not control his speed. He crashed into the stationary car and the plaintiff was injured.

He further stated that 10 days before the accident the brakes of his car failed while he was driving in the town and he took it to Bah Say Motor Company for repair. He gave instructions for a general overhaul and for particular attention to be given to the brakes. On the day before the accident plaintiff and defendant and the witness Wong went to the Bah Say Motors to see if the car was ready and found the foreman on the point of taking it out for a test. Defendant returned at 5 p.m. and took delivery of his car. He drove it and tested the brakes and found them in order. The next day he took plaintiff and her husband and other persons in all six adults and one child some 13 miles out of Georgetown to inspect some land and all witnesses agree that the car behaved well and the plaintiff drove properly until the accident on the way back. Defendant says he used his brakes several times on the journey out and they acted properly. Defendant therefore claims that the accident was inevitable and that no negligence can be attributed to him.

The person who was foreman of the Bah Say Motors in August, 1949, gave evidence that he overhauled the defendant's car in that month and adjusted the brakes. He tested the car and when he handed it over to defendant he was satisfied it was in order and that the brakes were effective.

Mr. D. L. Wong gave evidence which confirmed the defendant's account of their visit to the Bah Say Motors on the day before the accident to see if the car had been repaired and the defendant himself produced a receipt account from the Garage for the cost of the repairs. There is no doubt that the defendant's car was overhauled and its brakes tested as stated and it is in evidence that the Bah Say Motors are a competent firm of motor car repairers.

Mr. Wong also gave evidence confirming the defendant's assertion that he called out when half-way down the hill that his brakes had failed. This is, however, denied by the plaintiff and her husband who gave evidence on her behalf.

For the defendant a number of cases have been cited which run through *The Kite*[1], *The Mulbera*[2], *Stennett v. Hancock*[3], and end with *Woods & Duncan & Ors. v. Cammell Laird & Co. Ltd.*[4]. In the last mentioned case the House of Lords confirmed the statements of the law which are contained in the previous cases. From all these cases it is quite clear that in a case of *res ipsa loquitur* the onus is thrown on the defendant to give a reasonable explanation as to how the accident occurred. If defendant gives a reasonable explanation the onus is then thrown back on the plaintiff to prove negligence.

Against this it has been argued for the plaintiff that when as in this case the defendant alleges the accident was due to a latent defect he must prove the nature of the defect in the car and that it could not be detected with reasonable care. This statement of the law is contained in *Charlesworth on Negligence,* page 101 but the authority for the statement is a Scottish law report which is not available. But I will assume that the statement properly represents the opinion expressed in the judgment and consider these two points. Defendant has shown, and in my view he has shown satisfactorily, that his brakes failed some 10 days before the accident and he took his car to a competent firm of motor car repairers and told them to adjust the brakes and overhaul the car. He was given his car back the day before the accident, after being tested, and he accepted it with the full assurance that it had been put in order. He also states that when half-way down the hill he called out that his brakes had failed and that assertion is supported by Mr. Wong. This is a most material point in deciding the nature of the defect that caused the accident. A man driving his car down a hill and applying his brakes would know at once whether they were acting properly or not and his natural reaction when they failed would be to exclaim the fact. Against that I have the plaintiff's and her witness's denial of this. Mr. Wong appears to me to be an independent witness, although it is alleged that he is not on good terms with the plaintiff's husband and he has admitted it. I see no reason to disbelieve Mr. Wong and the defendant on this point. I find that the defendant did call out when half-way down the hill that his brakes had failed. We have therefore two points of evidence bearing on the nature of the latent defect alleged by defendant. First, the fact that his brakes failed 10 days before and secondly, that he called out immediately when they failed on the hill. I think the evidence is sufficient to show the nature of the latent defect.

The other question is whether the defect could have been detected with reasonable care. The defence on this point is that the car was sent to a competent firm of motor car repairers and the defendant accepted it back from them with an assurance that it was in order. No evidence has been given to show any reason why he should suspect that the brakes were still not in order, and I think it has not been shown that this defect could have been discovered with reasonable care.

The case of *Stennett v. Hancock*[3], is very much in point in this matter. That was presented as a case of *res ipsa loquitur* and the defence was inevitable accident. In giving judgment for the defendant Branson, J. said: "I cannot think, however, that it would be right to say that a person who employs a skilled and competent repairer to repair his vehicle is omitting any duty which he owes to himself or to any body else if he trusts to that man having done his work properly, and, in reliance upon that, takes the vehicle upon the road". This dictum fits the facts in the case before the Court exactly, and it is clear that no negligence can be attributed to the defendant. In my view the defendant by his explanation has rebutted the presumption of negligence and judgment will be entered for him.

The claim is dismissed with costs.

Claim dismissed.